SUPREME COURT, U. S.

Supreme Court, U. S.
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IN THE

Supreme Court of the United States

October Term, 1974
No. 74-1215

T. J. FALGOUT BOATS, INC., and INSURANCE COMPANY OF NORTH AMERICA,

Petitioner,

vs.

UNITED STATES OF AMERICA, THE DEPARTMENT OF THE NAVY,

Respondent.

Petition for a Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit.

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UNITED STATES OF AMERICA, THE DEPARTMENT OF THE NAVY,

Respondent.

Petition for a Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit.

The petitioners, T. J. Falgout Boats, Inc., and Insurance Company of North America respectfully pray that a writ of certiorari issue to review the judgment and opinion of the United States Court of Appeals for the Ninth Circuit entered in this proceeding on December 27, 1974.

Opinions Below.

The opinion of the Court of Appeals, not yet reported, appears in the appendix hereto. The opinion of the District Court for the Central District of California, reported in 361 F. Supp. 838 (C.D. Cal. 1972), appears in the appendix hereto.

Jurisdiction.

The judgment of the Court of Appeals for the Ninth Circuit was entered on December 27, 1974. This petition for certiorari was filed within ninety (90) days of that date. This court's jurisdiction is invoked under 28 U.S.C. §1254(1).

Question Presented.

Whether the Federal Tort Claims Act, 28 U.S.C. §1346, or the Suits in Admiralty Act, 46 U.S.C. §742, governs the relief sought by the owner of a ship for property damage sustained while operating in navigable waters off the coast of California when it was struck by a sidewinder missile negligently fired by the pilot of a United States Navy jet fighter plane.

Statutory Provisions Involved.

United States Code, Title 28, §1346 appears in the appendix hereto.

United States Code, Title 46, §742 appears in the appendix hereto.

Statement of the Case.

On August 12, 1968 the Pacific Seal, a 299 gross ton ship owned by Falgout Boats, Inc., and insured by Insurance Company of North America, while operating in navigable waters off the coast of California, was struck by a sidewinder missile released from a United States Navy jet fighter plane. The United States did not contest that the Navy pilot who released the sidewinder missile conducted the flight with the express permission and consent of the United States, negligently operating the aircraft, and negligently firing the missile which struck the ship.

The petitioners' complaint for property damage was filed in the United States District Court, Central District of California, on August 24, 1970.

On September 24, 1972, the Honorable Albert Lee Stephens, Jr., held that the petitioners' cause of action fell within the jurisdiction of the Suits in Admiralty Act, not the Federal Tort Claims Act. As more than two years had passed from the date of the injury to the date of filing the complaint, the judge ruled that the two-year statute of limitations barred the petitioners' suit and dismissed the petitioners' complaint. Judge Stephens found that the negligence of the Navy pilot in firing the sidewinder missile was within maritime service, navigation, or commerce and that the plaintiffs' underlying cause of action was "primarily of a maritime nature".

The United States Court of Appeals for the Ninth Circuit affirmed the judgment holding that the circumstances under which the petitioners' damages occurred bore a significant relationship to traditional maritime activities.

The petitioners' complaint was filed in the Federal District Court as the United States of America was a party defendant.

REASONS FOR GRANTING THE WRIT.

The decision of the Court of Appeals in applying the Suits in Admiralty Act, by holding that the Suits in Admiralty Act applies to a situation involving damage to a ship caused by a sidewinder missile negligently fired from a jet fighter plane and thus applying the two-year statute of limitations, is a decision of a federal question which has not been, but should be, settled by this court.

A. Two Cases Applying Similar Facts in Other Circuits Found That Tort Claims Act Was Remedy Against Government.

An exhaustive search for reported cases decided upon facts involving damage to a ship while on navigable waters caused by an object coming from the air in which the United States was a defendant, resulted in the discovery of only two cases, both of which held that the Tort Claims Act applied. With the decision of the Court of Appeals in this case, an unexplained and unresolved conflict has arisen among the circuits. The facts of the two cases applying the Tort Claims Act are set out to demonstrate the close similarity in their factual situations with the case before the Court:

1. In *Moran v. United States,* 102 F. Supp. 275 (D. Conn. 1951), the government was held liable under the Federal Tort Claims Act for deaths and property damage occurring when a military bomb, which had been dropped during a bombing practice session from an airplane, became entangled in a fishing net. When the fishermen aboard the ship were pulling in the fishing net, the bomb exploded, sinking the ship, causing property and personal injury damages. In

allowing relief under the Federal Tort Claims Act, rather than maritime law, the Court made the distinction between a tort committed by an employee for which an action lies under the Federal Tort Claims Act and the tort of a vessel for which action lies under the Suits in Admiralty Act.

2. In *Goodwin v. United States,* 141 F. Supp. 445 (E.E.N.C. 1956), the plaintiff's fishing vessel was "oystering" in navigable waters when it was struck from above by a practice bomb dropped from a United States government Marine Corps aircraft. The vessel sunk. The Court allowed both property damage for the total loss of the vessel as well as damages for physical and mental suffering under the Federal Tort Claims Act.

B. Executive Jet Expanded the Criteria to Include a Maritime Connection to the "Wrong".

The District Court Trial Judge did not have available to him this Court's decision in *Executive Jet Aviation, Inc. v. City of Cleveland,* 409 U.S. 249 (1972), which was not reported until after the Trial Judge's decision. In the *Executive Jet* case guidelines were established for determining whether or not a given situation constitutes a maritime tort. The traditional "locality test" was expanded to include an additional test requiring a showing that the wrong bears a significant relationship to a traditional maritime activity. In affirming the District Court's opinion in that case, Justice Stewart approved the analysis that the claimed wrong—the alleged failure to keep the runway free of birds and the failure to adequately warn the pilots of their presence upon the end of the runway—bore no relationship to maritime service, navigation, or com-

merce, therefore was not a maritime tort to which the admiralty jurisdiction applied.

C. The Court of Appeals Sets Aside the Executive Jet Criteria.

Factually there is no dispute that a jet fighter plane pilot negligently fired a sidewinder missile which struck the petitioners' ship which at the time was on navigable waters. To hold that the respondent's cause of action comes within the Suits in Admiralty Act, under the tests established in *Executive Jet, supra,* requires a finding that the jet fighter plane at the time of the wrong was in navigable waters and that the *wrong* bears a significant relationship to some traditional maritime activity must be found.

However, the Court of Appeals sets aside as not applicable the *Executive Jet* criteria on its determination that the facts are distinguishable, but then goes on to cite, as authority for its conclusion, cases that involve an oil spill, the crash of a transoceanic cargo plane, and the sinking of a fishing ship by a Navy destroyer.

The importance of this Court's determination and clarification of the law in this area is aptly demonstrated by the Court of Appeals citation of the *Roberts v. United States,* 498 F. 2d 520 (C.A. 9, 1974) case to support its position. This case involved the crash of an aircraft used to transport cargo over the Pacific Ocean from Los Angeles to Vietnam. The Court pointed out that the transoceanic transportation of cargo has long been recognized traditional maritime activity. However, it would seem a *non sequitur* to then conclude that the negligent and accidental striking of a ship by a missile fired from a Navy aircraft is a traditional maritime activity, as it can bear little, if any,

relationship to maritime service, navigation, or commerce.

The citing as relevant authority a case involving an oil spill [*Oppen v. Aetna Insurance Company,* 485 F. 2d 252 (C.A. 9, 1973)] and a case where a fishing vessel was sunk by a United States Navy destroyer [*Continental Tuna Corp. v. United States,* 499 F. 2d 774 (C.A. 9, 1974)] by the Court of Appeals further demonstrates the need for the Supreme Court's interpretation of the proper remedy to be applied when through one of its agents the government causes damage on the high seas by the negligently dropping or firing of an explosive or other object.

The Court of Appeals in using these cases as analogous authority for reaching its conclusion in no way ties in how the facts in those three cases help support the finding that firing a missile from an airplane fortuitously striking a ship on the water bears any relationship to maritime service, navigation, or commerce.

The intentional rejection of the *Executive Jet* decision by the Court of Appeals and reliance upon cases of questionable analogy demonstrate the importance of the Court granting the writ of certiorari to clarify the application of the appropriate relief for future litigants and for a fair determination under the facts of this case.

The traditional maritime activities of cargo shipping, posting of navigation aids or warning devices, or protecting the working place of persons aboard ships all of which are within the ambit of traditional maritime activities from which "wrongs" can create Suits in Admiralty liability for the United States Government are significantly absent from this case. The "wrong" of

negligently firing a sidewinder missile certainly bears no significant relationship to a traditional maritime activity, any more than does the *Executive Jet* case's "wrong" of the alleged failure to keep the runway free of birds and the failure to adequately warn pilots of the birds' presence upon the end of the runway.

The fact that the aircraft involved happens to belong to the United States Navy certainly does not determine whether or not the activity involved, the negligent firing of the missile, was a traditional maritime activity. The Air Force, Army and Marines all fly fighter planes over navigable waters. Further, the Navy aviation branch has record of substantial achievements against land-based targets. The fact that testing, evaluation, and training involving the use of a sidewinder missile is carried on in the area of the incident with Navy fighter planes seeking out drone aircraft targets, cannot assist in the definition of a traditional maritime activity when fortuitously a sidewinder missile misses its airborne target or is inadvertently released striking a ship below.

The carrying out of an air-to-air missile testing, evaluation and training program over navigable waters, away from normal shipping lanes and away from residential areas is a practical necessity. It is difficult to conceive that when a missile goes astray, the government can in good faith maintain that the Navy was involved in a traditional maritime activity.

The military establishment's continuation of its development, testing, evaluation and training in the use of sophisticated armament systems poses a continuing threat to the safety of ships and their crews at sea. The difficulty in applying the traditional "locality" test, even

when further clarified by the *Executive Jet* expansion to add the clarification that the "wrong" involved must bear a significant relationship to a traditional maritime activity, appears obvious by the Court of Appeals rejection of the *Executive Jet* as authority applicable in this case. The existing confusion is further evidenced by the strong reliance on the *Executive Jet* case by the government in their brief and argument before the Court of Appeals.

The two extremes have been judicially determined:

1. Ships collide at sea—admiralty jurisdiction under traditional "locality" test.

2. An airplane crashes into navigable water—not admiralty, under the expanded test in *Executive Jet.*

The case before the Court involves a private ship in navigable water being damaged, while the "wrong" occurred overhead in a government fighter plane negligently releasing a missile. If the *Executive Jet* decision means what it says: "The wrong must bear a significant relationship to a traditional maritime activity", then the Court in this case can clarify the existing confusion.

Conclusion.

For these reasons a writ of certiorari should issue to review the judgment and opinion of the Ninth Circuit.

Respectfully submitted,

DeWitt F. Blase, Jr.,
F. T. Muegenburg, Jr.,
Counsel for Petitioner.

April 8, 1975.

APPENDIX.

1. A copy of the Opinion and Judgment of the Court of Appeals.
2. A Copy of the Opinion and Judgment of the District Court.
3. United States Code, Title 28: §1346.
4. United States Code, Title 46: §742.

Opinion and Judgment of the Court of Appeals.

United States Court of Appeals, Ninth Circuit.

T. J. Falgout Boats, Inc., and Insurance Company of North America, Appellants, v. United States of America, The Department of the Navy, Appellee. No. 73-1755.

OPINION

Appeal from the United States District Court, Central District of California.

Filed: December 27, 1974.

Before: KILKENNY and TRASK, Circuit Judges, and RICH, Judge, United States Court of Customs and Patent Appeals.*

KILKENNY, Circuit Judge:

This case was heard in the district court and is now before us on an agreed statement of facts, the germane portion of which reads:

* * *

"On August 12, 1968, a ship, the PACIFIC SEAL, a 299 gross tons ship owned by Falgout Boats, Inc., operating in navigable waters off the coast of California, was struck by a Sidewinder

*The Honorable Giles S. Rich, Judge, United States Court of Customs and Patent Appeals, sitting by designation.

missile, which was released from a U.S. Navy airplane. The circomstances [sic] of the incident are not fully known since the airplane crashed on this mission and the pilot was killed. The United States will offer no evidence to contest Plaintiffs' allegations of negligence, set forth in Paragraph III of the Complaint. The final accepted joint survey made and signed by the U.S. Salvage Association surveyor, R. S. Ritchie, representing the United States Navy and Sidney G. Barnett, surveyor for the Insurance Company of North America and Falgout Boats, Inc., accepted repair damages in the total sum of $7,743.59 as due to the damage caused by the missile. This amount, however, was exclusive of miscellaneous damage items, later accepted by the Navy surveyor as $770.00. The total damages attributable to this incident are therefore agreed to be $8,513.59."[1]

Paragraph III of the complaint, mentioned in the agreed statment of facts, charges that the Navy pilot who released the Sidewinder missile conducted the flight with the express permission and consent of the appellee, negligently operated the aircraft, and negligently fired the missile which struck appellant Falgout's ship.

The lower court held that: (1) appellants' exclusive remedy against the appellee is under the Suits in Admiralty Act, 46 U.S.C. §§ 741-752, and (2) since more than two years elapsed from the date of the casualty to the filing of the complaint, appellants' claim is barred by the Act's two-year statute of limitations, 46 U.S.C. § 745. We affirm.

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[1]Certain correspondence between appellants and appellee is attached to the statement.

ISSUES

On appeal, appellants challenge both of the district court's conclusions. They contend that their action lies under the Federal Tort Claims Act, 28 U.S.C. § 1346(b), rather than under the Suits in Admiralty Act.

REMEDY

The Supreme Court has uniformly held that a maritime action may be maintained against the United States only under the Suits in Admiralty Act. *Brady v. Roosevelt S.S. Co.*, 317 U.S. 575 (1943). Subsequent amendments to the Act, as amended September 13, 1960, 74 Stat. 912, have not altered the rule. *United Continental Tuna Corp. v. United States*, 499 F.2d 774 (CA9 1974).

Prior to the Supreme Court's decision in *Executive Jet Aviation v. City of Cleveland*, 409 U.S. 249 (1972), maritime jurisdiction was governed by the "locality rule" as recognized and defined in *THE PLYMOUTH*, 70 U.S. (3 Wall.) 20 (1865), a rule which applied admiralty jurisdiction whenever a maritime locality was involved. *Executive Jet*, upon which appellants rely, involved the crash of a commercial jetliner in Lake Erie while engaged in a flight wholly within the continental United States. There, the court annexed to the "locality rule" a requirement that the facts of the occurrence show "a significant relationship to traditional maritime activity." 409 U.S. at 268. It held that admiralty jurisdiction was lacking despite the fact that the accident occurred in navigable waters. In so holding, it concluded that the mere fact the alleged wrong occurred or was located on or over navigable waters, was not in itself sufficient to turn a common-

place airplane negligence case into a "maritime tort." The Court observed that it was far more consistent with the history and purpose of admiralty to require, in addition to a maritime locality, that the occurrence bear a significant relationship to traditional maritime activity. The Court made it clear that it was not deciding whether an aviation tort could ever qualify for admiralty jurisdiction. *Id.* at 271.

Our problem is to decide whether the circumstances under which appellants' damages occurred bear a significant relationship to traditional maritime activity.

In analyzing *Executive Jet,* the Fifth Circuit in *Kelly v. Smith,* 485 F.2d 520, 525 (CA5 1973), *cert. denied* .... U.S. .... (1974), suggested that in determining whether the wrong bears a significant relationship to traditional maritime activity, the court should look to the following factors: ". . . the functions and roles of the parties; the types of vehicles and instrumentalities involved; the causation and the type of injury; and traditional concepts of the role of admiralty law." *Accord: St. Hilaire Moye v. Henderson,* 496 F.2d 973, 978 (CA8 1974). We adopt these factors as persuasive on our facts.

Unlike the aircraft in *Executive Jet,* the subject aircraft is by its very nature maritime. Without question, the release of the Sidewinder from the naval aircraft over navigable waters created a potential hazard to navigation, and the activities of the aircraft at the time were maritime in nature. The United States Navy exists, in major part, for the purpose of operating vessels and aircraft in, on, and over navigable waters. Its aviation branch is fully integrated with the naval service and, whether land-based or sea-based, functions essentially

to serve in sea operations. 10 U.S. § 5012.[2] Surely it cannot be said that the naval plane's activity over water in the instant case was entirely "fortuitous" as was the plane involved in *Executive Jet*. We seriously doubt if appellants would question the applicability of the Suits in Admiralty Act if the aircraft had been stationed on an aircraft carrier. The record is silent on this point. It is our studied conclusion that *Executive Jet* is clearly distinguishable and does not control on the facts before us.

Closely in point is *Roberts v. United States*, 498 F.2d 520 (CA9 1974), *cert. denied* .... U.S. .... (Dec. 16, 1974). There, the claims grew out of the crash of a private cargo plane into navigable waters as it was approaching an airbase in Okinawa. The aircraft was engaged in transporting cargo between Los Angeles and Viet Nam, with Okinawa being merely one of a number of intermediate stopping points. We noted there that transoceanic transportation of cargo is recognized as a traditional maritime activity. We further noted that prior to the advent of aviation, such shipping could be

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[2]"§ 5012. *United States Navy: composition; functions*

(a) The Navy, within the Department of the Navy, includes, in general, naval combat and service forces and such aviation as may be organic therein. *The Navy shall be organized, trained, and equipped primarily for prompt and sustained combat incident to operations at sea.* It is responsible for the preparation of naval forces necessary for the effective prosecution of war except as otherwise assigned and is generally responsible for naval reconnaissance, antisubmarine warfare, and *protection of shipping.* [Emphasis supplied.]

"(b) All naval aviation shall be integrated with the naval service as part thereof within the Department of the Navy. *Naval aviation consists of combat and service and training forces, and includes land-based naval aviation, air transport essential for naval operations, all air weapons and air techniques involved in the operations and activities of the Navy,* and the entire remainder of the aeronautical organization of the Navy, together with the personnel necessary therefor." [Emphasis supplied.]

performed only by waterborne vessels, just as here, before the birth of aviation, the firing at sea of explosive projectiles was performed only by waterborne vessels. After an exceptionally able discussion of the problem by the author and an exhaustive analysis of the pertinent authorities, statutes and amendments, it was held that the occurrence was intrinsically maritime in nature, was governed by the Suits in Admiralty Act, and, consequently, that an action could not be maintained under either the Federal Torts Claims Act or the Death on the High Seas Act, 46 U.S.C. §§ 761-768. An application of the logic employed in *Roberts* to the facts before us compels the conclusion that the activity of the Navy jet bore a significant relationship to traditional maritime activity and that exclusive jurisdiction of the claim rests within the perimeter of the Suits in Admiralty Act. The provisions of 10 U.S.C. § 5012, when read with *Roberts,* permits us to reach no other conclusion.

Another Ninth Circuit case in general support of our conclusion is *Oppen v. Aetna Ins. Co.*, 485 F.2d 252 (CA9 1973), which involved the Santa Barbara Channel oil spill. There, the plaintiffs sought damages for injury to their maritime vessels and for interference with their navigation rights. We had no difficulty in distinguishing *Executive Jet* and in finding that the claims bore a significant relationship to the traditional maritime activity.

Also pertinent is *United Continental Tuna Corp. v. United States, supra,* a case involving a fishing vessel which was sunk by a United States Navy destroyer in Philippine waters. It was there held that an action could not be prosecuted under the Federal Tort Claims Act, where such an action was maintainable under the

Suits in Admiralty Act. The 1960 Amendment was held not to change the exclusivity of the remedy.

Other authorities cited by the parties have received our attention. We do not discuss them because to do so would only add to the length of this opinion, without benefit to either bench or bar.

STATUTE OF LIMITATIONS

United Continental Tuna Corp. v. United States, supra, and *Roberts v. United States, supra,* are dispositive of this issue. Because appellants' cause of action must be prosecuted under the Suits in Admiralty Act, and because the action was not commenced within the two-year period provided for in 46 U.S.C. § 745, the action cannot be maintained. The provisions of the section are jurisdictional and cannot be tolled. *Roberts v. United States, supra,* at 527.

CONCLUSION

Consequently, on the facts of this case, no action can be maintained under the Federal Tort Claims Act and action under the Suits in Admiralty Act is barred by the two-year statute of limitations.

The judgment of the district court is AFFIRMED.

Opinion and Judgment of the District Court.

T. J. Falgout Boats, Inc., et al., Plaintiffs, v. United States of America et al., Defendants. Civ. No. 70-1896-ALS.

United States District Court, C.D. California. Sept. 15, 1972.

Findings of Fact and Conclusions of Law. Dec. 26. 1972.

Action was brought for damage to privately owned vessel which, while operating in navigable waters off the coast of California, was struck by a missile released from a United States Navy airplane. The District Court, Stephens, Chief Judge, held that cause of action against the United States for damage to the vessel was within exclusive admiralty jurisdiction; that there was no jurisdiction under the Federal Tort Claims Act; and that action was barred by limitations within the Suits in Admiralty Act.

Complaint dismissed.

ORDER

STEPHENS, Chief Judge.

The above entitled and numbered cause came on regularly for trial on August 28, 1972. The Court has considered all pleadings and documents filed herein. The parties have submitted the case on an Agreed Statement of Facts. Having been fully advised, the Court makes the following order:

The Court finds that plaintiffs' vessel, the M/S Pacific Sea, was operating in navigable waters off the coast of California at the time it was struck by a Sidewinder missile released from a United States Navy airplane on August 12, 1968.

The Suits in Admiralty Act, at 46 U.S.C. § 742, states in part:

> "In cases where if such vessel were privately owned or operated . . . or if a private person or property were involved, a proceeding in admiralty could be maintained, any appropriate nonjury proceeding in personam may be brought against the United States . . ."

This language places the jurisdiction of the Suits in Admiralty Act over all maritime torts alleged against the United States. "The Suits in Admiralty Act vests exclusive jurisdiction in the district courts when the suit is of a maritime nature." Amell v. United States, 384 U.S. 158, 159, 86 S.Ct. 1384, 1385, 16 L.Ed.2d 445 (1966). The Court finds that the underlying cause of action is primarily "of a maritime nature" and should be considered a proceeding in admiralty. Therefore, exclusive jurisdiction over the cause is vested in the United States District Court pursuant to the Suits in Admiralty Act. *Id.*

The plaintiffs have filed this action under the Federal Tort Claims Act, 28 U.S.C. § 1346(b), over two years after the cause of action arose, arguing that the negligence of the Navy pilot has no relationship to maritime service, navigation or commerce. The Court disagrees. This lawsuit should have been filed under the Suits in Admiralty Act.

The Suits in Admiralty Act further provides:

> "Suits as authorized by this chapter may be brought only within two years after the cause of action arises . . ." 46 U.S.C. § 745.

The plaintiffs are therefore required to file the complaint within two years of August 12, 1968. "The two-year statute of limitations begins to run when the cause of action arises." H-10 Water Taxi Co. v. United States, 379 F.2d 963, 964 (9th Cir. 1967). The complaint shows on its face that the incident occurred on August 12, 1968. But the complaint wasn't filed until August 24, 1970, more than two years later.

The raising of the bar of the statute of limitations by a failure to commence the action within two years goes

to jurisdiction and can't be tolled or waived. *Id.;* States Marine Corp. of Delaware v. United States, 283 F.2d 776, 778 (2d Cir. 1960). Therefore, the statute of limitations bars the plaintiffs' suit.

It is unfortunate that the suit is so barred. But, "[s]uch unfortunate results will probably occur so long as there are statutes of limitations. However, statutes of limitations exist to protect other important interests which must also be accommodated." Martin v. Grace Line, Inc., 322 F.Supp. 395, 397 (E.D.Cal.1970).

Therefore, the Court must order judgment for the defendants and it is so ordered. The defendants are directed to prepare a Judgment and proposed Findings of Fact and Conclusions of Law not inconsistent with this order which should be lodged within 21 days after receipt of this order.

FINDINGS OF FACT AND CONCLUSIONS OF LAW

The above entitled and numbered cause came on regularly for trial on August 28, 1972. The Court has considered all pleadings and documents filed herein. The parties have submitted the case on an agreed statement of facts as outlined below. Having been fully advised, the Court makes the following Findings of Fact and Conclusions of Law:

FINDINGS OF FACT

1. This action was commenced by the plaintiffs on August 24, 1970, under the Federal Tort Claims Act, 28 U.S.C. § 1346(b), for damages caused to its ship, the M/S Pacific Seal.

2. The plaintiff T. J. Falgout Boats, Inc. is a corporation located at Galveston, Texas.

3. The plaintiff Insurance Company of North America is a corporation with its principal place of business located at Houston, Texas; and is doing business at 374 Poli Street, Ventura, California, within the jurisdiction of this Court.

4. The defendant The Department of the Navy is an agency of the defendant United States of America.

5. The parties herein have submitted to the Court on June 15, 1972, an Agreed Statement of Facts which substantially recites the following:

a. On August 12, 1968, a ship, the Pacific Seal, a 299 gross tons ship owned by Falgout Boats, Inc., operating in navigable waters off the coast of California, was struck by a Sidewinder missile, which was released from a United States Navy airplane.

b. The circumstances of the incident are not fully known since the airplane crashed on this mission and the pilot was killed.

c. The United States of America offered no evidence to contest plaintiffs' allegations of negligence.

d. The final accepted joint survey made and signed by the U.S. Salvage Association surveyor, R. S. Ritchie, representing the United States Navy, and Sidney G. Barnett, surveyor for the Insurance Company of North America and Falgout Boats, Inc., accepted repair damages in the total sum of $7,743.59 as due to the damage caused by the missile.

e. The above amount is exclusive of the miscellaneous damage items accepted by the Navy surveyor as $770.00. The total damages are therefore agreed to be $8,513.59.

f. The Complaint was served upon the United States Attorney, Central District of California, on May

4, 1971, and upon the Attorney General on May 6, 1971.

g. Exhibits "A" through "J" constitute the correspondence between the parties prior to the filing of the Complaint concerning the incident and subsequent repairs. See the Agreed Statement of Facts filed June 15, 1972, and the Addition to the Agreed Statement of Facts Proposed by Plaintiffs, filed August 23, 1972.

The United States of America has not denied any of the allegations concerning the circumstances of the accident as described above and has not denied the allegations of negligence. Therefore, the Court finds that the plaintiff's vessel, M/S Pacific Seal, was on August 12, 1968, struck by a Sidewinder missile negligently released from a Navy airplane while said vessel was operating in navigable waters off the coast of California. The Court further finds all of the facts discussed above which were recited by the parties in the Agreed Statement of Facts filed June 15, 1972, to be true.

6. Counsel have stipulated in open court on August 28, 1972, concerning the Addition to the Agreed Statement of Facts, as follows:

> "MR. MUEGENBURG: . . . I think Mr. Sterling suggested, in the document he filed [Defendant's Reply Memorandum filed August 23, 1972], to the Court last week that he would be prepared and I would agree that any statements that are in any way contested or not admitted or agreed to by the Naval Claims Officer, Mr. Marsh. that are set forth in Mr. Marsh's Affidavit

could be admitted as evidence and that the statements contained in my proposed Addition to the Agreed Statement of Facts could be considered my—in the form of an affidavit and all other matters would be deemed as facts as set forth in that Addition to the Agreed Statement of Facts.

"THE COURT: Is it so stipulated then?

"MR. STERLING: Yes, it is so stipulated."

The only conflict in the facts concerns the contents of a telephone conversation of January 8, 1971, between plaintiffs' counsel and the government claims officer, Mr. Marsh. The conversation concerned the possibility of administrative settlement of the claim even though the complaint had been filed. This conversation is material only regarding the cause of action under the Federal Tort Claims Act. As hereinafter appears, no action under the Federal Tort Claims Act lies. Therefore, the conflict in the evidence is immaterial.

7. The defendants have affirmatively defended on the ground that the complaint involves a "maritime tort" and therefore the sole remedy falls under the Suits in Admiralty Act, 46 U.S.C. §§ 741-752. The defendants further affirmatively allege that inasmuch as plaintiffs' Complaint was not filed within two years after the incident in controversy, the claim is barred by the two-year statute of limitations of the Suits in Admiralty Act, 46 U.S.C. § 745.

8. Any Finding of Fact deemed to be contained in the Conclusions of Law is included herein by reference.

CONCLUSIONS OF LAW

[1] 1. This Court has jurisdiction over the instant cause of action pursuant to the Suits in Admiralty Act, 46 U.S.C. §§ 741-752.

The Act, at section 742, provides in part:

> "In cases where if such vessel were privately owned or operated . . . or if a private person or property were involved, a proceeding in admiralty could be maintained, any appropriate nonjury proceeding in personam may be brought against the United States . . ."

The words "or if a private person or property were involved" were added by an amendment to section 742 enacted in 1960, Pub.L. 86-770, 74 Stat. 912, § 3, September 13, 1960. The amendment:

> "restates in brief and simple language the now existing exclusive jurisdiction conferred on the district courts, both on their admiralty and law sides, over cases against the United States which could be sued on in admiralty if private vessels, persons, or property were involved." S.Rep.No. 1894, 86th Cong. 2d Sess., p. 2, U.S.Code Cong. & Admin.News, p. 3583.

The purpose of the 1960 amendment was to bring all maritime claims against the United States into the admiralty jurisdiction of the district court. Ira S. Bushey & Sons, Inc. v. United States, 398 F.2d 167 (2d Cir. 1968); Beeler v. United States, 256 F.Supp. 771 (W.D.Pa. 1966). "The Suits in Admiralty Act vests exclusive jurisdiction in the district courts when the

suit is of a maritime nature." Amell v. United States, 384 U.S. 158, 159, 86 S.Ct. 1384, 16 L.Ed.2d 445 (1966).

[2] The Court found as a Finding of Fact that the accident in controversy occurred while the M/S Pacific Seal was in navigable waters off the coast of California, *supra.* The underlying cause of action is primarily "of a maritime nature" and should be considered as a proceeding in admiralty. Therefore, jurisdiction over this cause of action is in the United States District Court under the Suits in Admiralty Act. Beeler v. United States, 224 F.Supp. 973 (W.D.Pa.1964), rev'd on other grds., 338 F.2d 687 (3rd Cir. 1964).

[3] 2. The Suits in Admiralty Act constitutes the exclusive remedy available to a litigant injured by a maritime tort.

The Federal Tort Claims Act, 28 U.S.C. at section 2680(d), specifically exempts from its jurisdiction any suit for which a remedy is provided under the Suits in Admiralty Act, 46 U.S.C. §§ 741-752. 28 U.S.C. § 2680 provides in part:

> "The provisions of this chapter and section 1346(b) of this title shall not apply to—
>
> . . .
>
> (d) Any claim for which a remedy is provided by sections 741-752, 781-790 of Title 46, relating to claims or suits in admiralty against the United States."

The Court has concluded herein that a remedy could be afforded the plaintiff under the Suits in Admiralty Act, 46 U.S.C. §§ 741-752. Therefore, there can be no jurisdiction in this court under the Federal Tort Claims Act to hear the instant cause of action. 28

U.S.C. § 2680(d); Utzinger v. United States, 246 F. Supp. 1022 (S.D.Ohio 1965); Tankrederiet Gefien A/S v. United States, 241 F.Supp. 83 (E.D.Mich. 1964); Tebbs v. Baker-Whitely Towing Co., 227 F. Supp. 656 (D.Md.1964). *Also see* De Bardeleben Marine Corp. v. United States, 451 F.2d 140 (5th Cir. 1971); Ira S. Bushey & Sons, Inc. v. United States, 398 F.2d 167 (2d Cir. 1968).

[4] 3. The Suits in Admiralty Act further provides:

> "Suits as authorized by this chapter may be brought only within two years after the cause of action arises . . ." 46 U.S.C. § 745.

The plaintiffs in this case were therefore required to file the complaint within two years of the date of the incident, August 12, 1968. "The two-year statute of limitations begins to run when the cause of action arises." H-10 Water Taxi Co. v. United States, 379 F.2d 963, 964 (9th Cir. 1967). The complaint shows on its face that it was not filed until August 24, 1970, more than two years after the incident.

[5] 4. The bar of the statute of limitations of the Suits in Admiralty Act goes to jurisdiction and cannot be tolled or waived. *Id.;* States Marine Corp. of Delaware v. United States, 283 F.2d 776, 778 (2d Cir. 1960). Therefore, the plaintiffs' claim herein is barred by the two-year statute of limitations of the Suits in Admiralty Act, 46 U.S.C. § 745.

5. Any Conclusion of Law deemed to be contained in the Findings of Fact is included herein by reference.

6. The complaint should be dismissed as against each defendant.

§ 742. Libel in Personam.

In cases where if such vessel were privately owned or operated, or if such cargo were privately owned or possessed, or if a private person or property were involved, a proceeding in admiralty could be maintained, any appropriate nonjury proceeding in personam may be brought against the United States or against any corporation mentioned in section 741 of this title. Such suits shall be brought in the district court of the United States for the district in which the parties so suing, or any of them, reside or have their principal place of business in the United States, or in which the vessel or cargo charged with liability is found. The libelant shall forthwith serve a copy of his libel on the United States attorney for such district and mail a copy thereof by registered mail to the Attorney General of the United States, and shall file a sworn return of such service and mailing. Such service and mailing shall constitute valid service on the United States and such corporation. In case the United States or such corporation shall file a libel in rem or in personam in any district, a cross libel in personam may be filed or a setoff claimed against the United States or such corporation with the same force and effect as if the libel had been filed by a private party. Upon application of either party the cause may, in the discretion of the court, be transferred to any other district court of the United States. As amended Sept. 13, 1960, Pub.L. 86-770, § 3, 74 Stat. 912.

§ 1346. United States as Defendant.

(a) The district courts shall have original jurisdiction, concurrent with the Court of Claims, of:

(1) Any civil action against the United States for the recovery of any internal-revenue tax alleged to have been erroneously or illegally assessed or collected, or any penalty claimed to have been collected without authority or any sum alleged to have been excessive or in any manner wrongfully collected under the internal-revenue laws;

(2) Any other civil action or claim against the United States, not exceeding $10,000 in amount, founded either upon the Constitution, or any Act of Congress, or any regulation of an executive department, or upon any express or implied contract with the United States, or for liquidated or unliquidated damages in cases not sounding in tort. For the purpose of this paragraph, an express or implied contract with the Army and Air Force Exchange Service, Navy Exchanges, Marine Corps Exchanges, Coast Guard Exchanges, or Exchange Councils of the National Aeronautics and Space Administration shall be considered an express or implied contract with the United States.

(b) Subject to the provisions of chapter 171 of this title, the district courts, together with the United States District Court for the District of the Canal Zone and the District Court of the Virgin Islands, shall have exclusive jurisdiction of civil actions on claims against the United States, for money damages, accruing

on and after January 1, 1945, for injury or loss of property, or personal injury or death caused by the negligent or wrongful act or omission of any employee of the Government while acting within the scope of his office or employment, under circumstances where the United States, if a private person, would be liable to the claimant in accordance with the law of the place where the act or omission occurred.

(c) The jurisdiction conferred by this section includes jurisdiction of any set-off, counterclaim, or other claim or demand whatever on the part of the United States against any plaintiff commencing an action under this section.

(d) The district courts shall not have jurisdiction under this section of any civil action or claim for a pension.

(e) This district courts shall have original jurisdiction of any civil action against the United States provided in section 7426 of the Internal Revenue Code of 1954.

(f) The district courts shall have exclusive original jurisdiction of civil actions under section 2409a to quiet title to an estate or interest in real property in which an interest is claimed by the United States. As amended Aug. 30, 1964, Pub.L. 88-519, 78 Stat. 699; Nov. 2, 1966, Pub.L. 89-719, Title II, § 202(a), 80 Stat. 1148; July 23, 1970, Pub.L. 91-350, § 1(a), 84 Stat. 449; Oct. 25, 1972, Pub.L. 92-562, § 1, 86 Stat. 1176.

Certificate of Service.

I hereby certify that on this 21st day of March, 1975, three copies of the Petition for Writ of Certiorari were mailed, postage prepaid, to the Solicitor General, Department of Justice, Washington, D.C. 20530. I hereby certify that a courtesy copy of the Petition for Writ of Certiorari was mailed to William D. Keller, United States Attorney, and Paul Gary Sterling, Attorney, West Coast Office, Admiralty and Shipping Section, U.S. Department of Justice, 450 Golden Gate Avenue, San Francisco, California 94102. I further certify that all parties required to be served have been served.

/s/ DeWitt F. Blase
DeWITT F. BLASE
220 South A Street
Oxnard, California 93030
Counsel for Petitioners

In the Supreme Court of the United States

OCTOBER TERM, 1974

No. 74-1215

T. J. FALGOUT BOATS, INC., ET AL., PETITIONERS

v.

UNITED STATES OF AMERICA, ET AL.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

MEMORANDUM FOR THE UNITED STATES IN OPPOSITION

Petitioners contend that the Federal Tort Claims Act, 28 U.S.C. 1346, rather than the Suits in Admiralty Act, 46 U.S.C. 742, should govern the relief they seek as owners of a ship operating in navigable waters that sustained property damage when struck by a missile accidentally released by the pilot of a Navy jet.

On August 24, 1970, petitioners filed suit against the United States and the United States Department of the Navy pursuant to the Federal Tort Claims Act, 28 U.S.C. 1346(b), for $8,513.59 in property damages caused to its ship, when, on August 12, 1968, it was struck by a Sidewinder missile accidentally fired by a Navy pilot from a United States Navy airplane (Pet. App. 10, 11).

The district court found that the suit was "primarily 'of a maritime nature' and should be considered as a proceeding in admiralty" (Pet. App. 15). Since petitioners failed to file their suit within two years of the date the cause of action arose, as required by the Suits in Admiralty Act, 46 U.S.C. 745, the district court dismissed the complaint (Pet. App. 14-16).

The court of appeals affirmed, finding that under the principles laid down by this Court in *Executive Jet Aviation* v. *City of Cleveland*, 409 U.S. 249, the circumstances under which petitioners' damages occurred bore a significant relationship to traditional maritime activity because the release of the Sidewinder from the naval aircraft over navigable waters created a potential hazard to navigation, and the activities of the aircraft at the time were maritime in nature (Pet. App. 4-5). The court concluded, therefore, that jurisdiction rested exclusively within the Suits in Admiralty Act (Pet. App. 6), and that since petitioners failed to comply with the two-year statute of limitations under that Act, the district court correctly dismissed the complaint (Pet. App. 7).

1. In *Executive Jet*, *supra*, this Court suggested that a relationship to traditional maritime activity sufficient to confer admiralty jurisdiction would lie in situations where aircraft involved in torts were at the time "performing a function traditionally performed by waterborne vessels," such as where a "plane flying from New York to London crashed in the mid-Atlantic" (409 U.S. at 271) or where two light aircraft engaged in spotting schools of fish collide (*id.* at 271, n. 22).

The reason for conferring admiralty jurisdiction in these situations was well expressed in *Kelly* v. *Smith*, 485 F. 2d 520, 526 (C.A. 5):

> The admiralty jurisdiction of federal courts stems from the important national interest in uniformity of law and remedies for those facing the hazards of waterborne transportation. Rifle fire directed at a vessel * * * on a major commercial artery, * * * presents sufficient danger to maritime commerce for the federal courts of admiralty to assume jurisdiction * * *.

In the instant case, the release of the missile from the naval aircraft over navigable waters clearly created a potential danger to navigation. Moreover, the activities of the aircraft were maritime in nature. As the court of appeals noted, the Navy's aviation branch "functions essentially to serve in sea operations" (Pet. App. 4-5). Accordingly, the case was within the admiralty jurisdiction.

2. There is no conflict among the circuits on the application of admiralty jurisdiction to torts arising from aircraft which perform a function traditionally performed by waterborne vessels.[1] *Goodwin* v. *United States*, 141 F. Supp. 445 (E.D. N.C.), and *Moran* v. *United States*, 102 F. Supp. 275 (D. Conn.) upon which petitioners rely (Pet. 4-5), were decided, respectively, in 1956 and 1951, when non-vessel maritime tort claims were cognizable against the United States under the Federal Tort Claims Act. In 1960, however, Congress amended the Suits in Admiralty Act so as to bring within its reach all non-

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[1]See, *e.g.*, *Roberts* v. *United States*, 498 F.2d 520 (C.A. 9), certiorari denied, 419 U.S. 1070 (crash of private cargo plane enroute from Los Angeles to Vietnam into navigable water on landing approach to air base in Okinawa); *Higginbotham* v. *Mobil Oil Corp.*, 357 F. Supp. 1164 (W.D. La.) (crash of helicopter acting as crewboat for offshore activities in Gulf of Mexico); *Hark* v. *Antilles Airboats, Inc.*, 355 F. Supp. 683 (D. V.I.) (crash of seaplane); *Kelly* v. *Smith*, *supra* (rifle fire from ashore directed at a fleeing boat, which wounded the pilot of the boat).

vessel maritime tort claims against the United States.[2] See, *e.g.*, *Roberts* v. *United States*, 498 F.2d 520 (C.A. 9), certiorari denied, 419 U.S. 1070; *DeBardeleben Marine Corp.* v. *United States*, 451 F. 2d 140 (C.A. 5); *Ira S. Bushey & Sons, Inc.* v. *United States*, 398 F.2d 167 (C.A. 2). Such claims, therefore, may no longer be brought under the Federal Tort Claims Act. 28 U.S.C. 2680(d).

Since petitioners admittedly failed to comply with the two-year statute of limitations governing maritime actions under the Suits in Admiralty Act, 46 U.S.C. 745, the court of appeals correctly held that the district court had no jursidiction over their complaint.

For the foregoing reasons it is respectfully submitted that the petition for a writ of certiorari should be denied.

ROBERT H. BORK,
Solicitor General.

MAY 1975.

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[2]A complete review of the purposes and consequences of the 1960 amendment is given in the government's brief in *United States* v. *United Continental Tuna Corp.*, No. 74-869, now pending in this Court.